

1 THE HONORABLE JAMES L. ROBART
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9
10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE
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15 MICROSOFT CORPORATION,
16
17 Plaintiff,

v.

18 MOTOROLA, INC., et al.,
19
20 Defendants.

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22 MOTOROLA MOBILITY, INC., et al.,
23
24 Plaintiffs,

v.

25 MICROSOFT CORPORATION,
26
27 Defendant.

28 Case No. C10-1823-JLR

29
30 **MICROSOFT'S RESPONSIVE CLAIM
31 CONSTRUCTION BRIEF ON ITS '780
32 AND '582 COUNTERCLAIM PATENTS**

33
34 **Noted for Hearing:** June 7, 2012

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36 MICROSOFT'S RESPONSIVE CLAIM
37 CONSTRUCTION BRIEF ON ITS '780 AND '582
38 COUNTERCLAIM PATENTS
39 Case No. C10-1823-JLR

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	A. U.S. Patent No. 6,339,780 to Shell et al. (filed May 6, 1997)	2
	1. “graphic element” (claims 1–2, 4–6, 9, 12–15, 20–21, 32–33, 39–40)	2
	2. “during times when the browser is loading <i>visible</i> content” (claims 2, 12)	5
	3. “obstruct[s/ing]” (claims 1, 12, 32, 33, 36, 39, 40).....	7
	B. U.S. Patent No. 7,411,582 to Toepke (effectively filed Dec. 16, 1997).....	7
	1. “icon” (claims 1, 15)	7
	2. “distinct from . . . computer/application/ programs” (claims 1, 11, 15, 19)	8
	3. “window” (claims 11, 14, 15, 21–23, 29–31).....	9
	4. “as if . . . received [via/from]” as used in: “. . . as if the information was received via user input received from a hardware input device” (claim 1) “. . . as if the input was received via a hardware keyboard” (claim 4) “. . . as if the information was received via user input at a hardware input device” (claim 11) “. . . as if the user data was received from a hardware input device” (claim 15) “. . . as if the input data was received via user input received from a hardware input device” (claim 19).....	9
	5. “invoking [a/the] selected input method” (claims 15, 17)	10
	6. “interface” (claims 3, 11, 27).....	12
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1 **TABLE OF AUTHORITIES**

2 **Cases**

3 <i>Elbex Video, Ltd. v. Sensormatic Elecs. Corp.</i> , 4 508 F.3d 1366 (Fed. Cir. 2007).....	5
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6 <i>New v. Dep't of Veterans Affairs</i> , 7 142 F.3d 1259 (Fed. Cir. 1998).....	11
8 <i>Omega Eng'g, Inc. v. Raytek Corp.</i> , 9 334 F.3d 1314 (Fed. Cir. 2003).....	1, 4
9 <i>Phillips v. AWH Corp.</i> , 10 415 F.3d 1303 (Fed. Cir. 2005) (en banc).....	7
11 <i>Sinorgchem Co. v. ITC</i> , 12 511 F.3d 1132 (Fed. Cir. 2007).....	11
12 <i>Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.</i> , 13 442 F.3d 1322 (Fed. Cir. 2006).....	3

14 **Other Authorities**

15 <i>Black's Law Dictionary</i> (6th ed. 1990).....	11
16 Bryan Garner, <i>A Dictionary of Modern Legal Usage</i> (2d ed. 2001)	11

TABLE OF ABBREVIATIONS

<u>Abbreviation</u>	<u>Description</u>	<u>ECF Nos.</u>	<u>Date</u>
Microsoft Br.	Microsoft's Opening Claim Construction Brief	223	3/30/12
Motorola Br.	Motorola's Opening Claim Construction Brief	225	3/30/12
McCune Decl. & Exs. A to AA	Declaration of Philip S. McCune in Support of Motorola's Portion of the Joint Claim Chart	158–163	1/7/12
McCune II Decl. & Exs. BB to HH	Declaration of Philip S. McCune in Support of Motorola's Opening Claim Construction Brief	226	3/30/12
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MICROSOFT CORPORATION'S RESPONSIVE
CLAIM CONSTRUCTION BRIEF ON ITS '780
AND '582 COUNTERCLAIM PATENTS - iv
Case No. C10-1823-JLR

1 **I. INTRODUCTION**

2 Motorola's brief makes one attempt after another to inject limitations from the preferred
 3 embodiment and prosecution history into the claims, all in the hope of manufacturing non-
 4 infringement arguments for patents that clearly are being infringed. To that end, Motorola's
 5 brief relies extensively on the doctrine of "prosecution disclaimer," so that doctrine is discussed
 6 first below, followed by a response to each of Motorola's claim construction arguments.

7 **II. LEGAL STANDARD FOR PROSECUTION DISCLAIMER**

8 The doctrine of prosecution disclaimer is not nearly as expansive as Motorola suggests.
 9 As Motorola recognizes, the leading case is *Omega Engineering, Inc. v. Raytek Corp.*, 334 F.3d
 10 1314 (Fed. Cir. 2003). Motorola repeatedly cites *Omega* in support of its prosecution disclaimer
 11 arguments but completely ignores the facts and holdings of the case, which do not support
 12 Motorola's position. In *Omega*, the district court had granted summary judgment of non-
 13 infringement on all three asserted patents based on narrow claim constructions that relied on
 14 prosecution disclaimer. On appeal, the Federal Circuit reversed across the board and repeatedly
 15 held that the district court's claim constructions were far too narrow. The Federal Circuit held
 16 that prosecution disclaimer requires a "clear and unmistakable" disavowal, *id.* at 1326, and thus
 17 the Federal Circuit rejected the district court's finding of "prosecution disclaimer" with respect
 18 to some claims, *see id.* at 1330–31. With respect to other claims, the Federal Circuit agreed that
 19 there was prosecution disclaimer, *see id.* at 1326–28, but the Federal Circuit *limited* the
 20 disclaimer to just the facts necessary to overcome the prior art: "The district court was . . .
 21 correct in finding prosecution disclaimer, but erred in ascertaining the *scope* of the disavowal."
 22 *Id.* at 1327 (emphasis added). "[W]e must give the claim language its presumptive *full* ordinary
 23 meaning, limited *solely* by the patentee's clear and unmistakable disclaimer." *Id.* at 1328
 24 (emphasis added). Motorola's brief fails to appreciate the stringent standard for prosecution
 25 disclaimer, and that when there is a disclaimer, it is limited in scope.

1 **III. THE PATENTS AND CLAIM CONSTRUCTIONS**

2 **A. U.S. Patent No. 6,339,780 to Shell et al. (filed May 6, 1997)**

3 **1. “graphic element” (claims 1–2, 4–6, 9, 12–15, 20–21, 32–33, 39–40)**

Microsoft’s Claim Construction	Motorola’s Claim Construction
No construction needed. Alternatively: “a discrete image for viewing on a computer display screen”	“a discrete image for viewing on a computer display screen that is not content ”

7 Motorola’s entire “prosecution disclaimer” argument concerns narrower phrases, such as
 8 “temporary graphic element,” rather than the broader phrase “graphic element” that is the actual
 9 phrase Motorola has chosen for construction. *See* Motorola Br. at 3:2–12, 3:23–6:7 (raising
 10 “prosecution disclaimer” arguments). Thus, as explained in Microsoft’s opening brief, nothing
 11 supports Motorola’s contention that the term “graphic element,” by itself, is always something
 12 other than “content.” *See* Microsoft Br. at 4:1–5:18. Once that dispute is resolved, no further
 13 construction is necessary. *See* Microsoft Br. at 1:15–2:9, 3:16–21 & n.1 (explaining why not
 14 every term needs to be construed).

15 In any event, Motorola’s proposed construction does not address the real dispute between
 16 the parties and if adopted would only raise more questions for the jury than it would answer.
 17 Motorola evidently hopes to use the phrase “that is not content” in its proposed construction to
 18 argue that its proposed construction excludes any image that “is from a source **external** to the
 19 browser.”¹ Significantly, Motorola’s new proposed construction is so clearly erroneous that it

20

 21 ¹ Such an argument by Motorola would be incorrect because it would depend on a logical
 22 fallacy concerning the term “content,” namely the assertion that **everything** “from a source
 23 external to a browser” is “content.” While it is true the parties have agreed that “content” is
 24 “from a source external to a browser,” *see* Motorola Br. at 1 n.2, that does not mean the reverse
 25 is true, i.e., that **everything** “from a source external to a browser” is “content” (and thus cannot
 be a “graphic element” under Motorola’s proposed construction). By way of analogy, even if all
 webpages come from the Internet, that does not mean everything from the Internet is a webpage
 (as opposed to something else, such as an image that says “Loading” as shown in Figure 1-9
 below, *infra* p. 3).

1 did not even make these arguments in connection with its proposed construction itself, but rather
 2 is belatedly attempting to “construe” its prior construction. The Court should adopt neither
 3 Motorola’s construction nor its untimely attempt to rewrite its construction, as neither is proper.
 4 Motorola’s effort to hide the ball can be seen from a review of its non-infringement contentions,
 5 which state:

6 Additionally, to the extent the accused “graphic elements”
 7 identified by Microsoft are comprised of data from “a
 8 source external to the browser,” these elements are content
 9 and, therefore, are not “graphic elements.” Upon
 10 information and belief, the graphic element illustrated in
 11 Figure 1-9 of Microsoft’s infringement contentions
 12 [reprinted to the right] is generated by data external to
 13 Google Maps and does not meet this element of this claim.

14 Wilson II Decl. Ex. S at 1–2; Wilson II Decl. Ex. R at 17.²

15 As shown by Motorola’s non-infringement contentions, the
 16 real claim construction dispute is whether the applicants ever
 17 disclaimed a “graphic element” positioned over the content viewing
 18 area where the image for the “graphic element” came from a source *external* to the browser.
 19 Motorola never points to such a disclaimer. Instead, Motorola merely argues that the applicants
 20 distinguished the Blonder reference, where “Blonder teaches the use of ‘padding’ —
 21 supplementary content already stored on the device that is seamlessly inserted into the viewing
 22 area to mask the fact that the requested content is taking additional time to load.” Motorola Br.
 23 at 4. In other words, Blonder did not display a “graphic element” *over* the content viewing area
 24 while the new content was being loaded, but instead Blonder simply displayed a “fake”

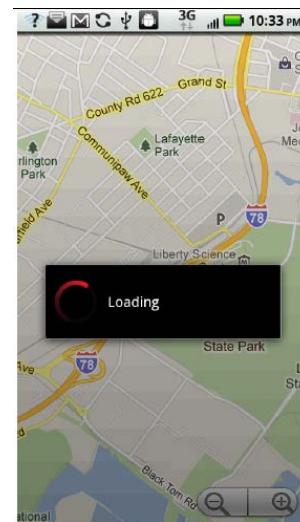
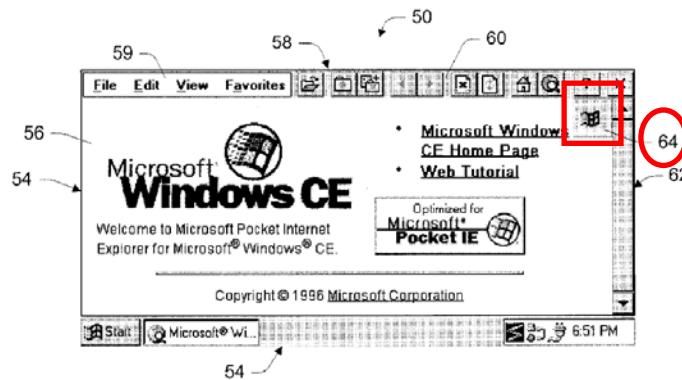


Figure 1-9

22 ² A district court may consider the accused products to help understand the claim
 23 construction dispute. *See Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.*, 442 F.3d
 24 1322, 1326–27 (Fed. Cir. 2006) (“While a trial court should certainly not prejudge the ultimate
 25 infringement analysis by construing claims with an aim to include or exclude an accused product
 or process, knowledge of that product or process provides meaningful context for the first step of
 the infringement analysis, claim construction.”).

1 webpage³ for the user to enjoy when the real webpage was taking too long to load. Thus when
 2 the applicants argued that the “core concept” of their invention was “a ***non-content*** graphic
 3 element appearing ***over*** a content area that is indicative of present condition where content is
 4 being loaded into the content area,” *id.* at 4, the applicants may have been disclaiming Blonder’s
 5 approach of displaying a “fake” webpage for the user to enjoy when the real webpage was taking
 6 too long to load, but they certainly never disclaimed a “graphic element” positioned over the
 7 content viewing area where the image for the “graphic element” came from a source ***external*** to
 8 the browser, as Motorola is hoping to accomplish with its proposed construction. *See supra* Part
 9 II, p. 1 (discussing scope of disclaimers under *Omega*).

10 Indeed, Motorola’s own brief acknowledges that the claims are broad enough to cover a
 11 “graphic element” where the image for the “graphic element” came from a source ***external*** to the
 12 browser. In particular, Motorola admits that the “Microsoft Flag 64” in figure 3 of the patent
 13 (reprinted below) is a “graphic element,” *see* Motorola Br. at 3:21, even though the patent
 14 provides no limitations on where the image for the Flag came from — for example, the image
 15 could have come from a Microsoft server on the Internet, which would be a source ***external*** to
 16 the browser:



23 ³ “Blonder gives the following example of padding: ‘For example, padding in an education
 24 tour may consist of a discussion of general trends in the cost and financing of tuition. This
 25 discussion may consist of graphs and charts accompanied by narration.’” McCune Decl. Ex. F at
 50376–77.

1 For all these reasons, the doctrine of prosecution disclaimer does not support Motorola's
 2 proposed construction. Once that dispute is resolved, no further construction is needed. The
 3 requirement in the claims of a "graphic element" positioned over the content viewing area is a
 4 straight-forward concept that will be easily understood by the jury.

5 **2. "during times when the browser is loading *visible*
content" (claims 2, 12)**

Microsoft's Claim Construction	Motorola's Claim Construction
No construction needed. Alternatively: "while the hypermedia browser is loading content (for the purposes of displaying the content), where at least part of the content is capable of being seen"	<u>Moto's original proposal</u> : "while the hypermedia browser is loading content into the content viewing area" <u>Moto's current proposal</u> : "while the hypermedia browser is loading <i>visible</i> content into the content viewing area"

11 Motorola relies entirely on the doctrine of "prosecution disclaimer" to argue that
 12 "loading visible content" means, in essence, "*displaying* the content." *See* Motorola Br. at 6:14–
 13 7:23.⁴ As explained in Microsoft's opening brief, the claims, specification, prosecution history,
 14 and extrinsic evidence all contradict Motorola's attempt to conflate "loading" with "displaying."
 15 *See* Microsoft Br. at 6:10–8:14.

16 The doctrine of "prosecution disclaimer" does not apply because Motorola cannot point
 17 to a "clear and unmistakable" statement in the prosecution conflating "loading" with
 18 "displaying." *See supra* Part II, p. 1 (discussing requirements for "prosecution disclaimer"); *see*
 19 also *Elbex Video, Ltd. v. Sensormatic Elecs. Corp.*, 508 F.3d 1366, 1372–73 (Fed. Cir. 2007)
 20 (rejecting prosecution disclaimer arguments). To the contrary, the portion of the prosecution
 21 history cited by Motorola confirms Microsoft's position that "loading" and "displaying" are two

22 ⁴ Motorola's non-infringement contentions reveal what Motorola is hoping to accomplish
 23 with its arguments. Motorola contends that its accused devices only show the alleged
 24 "temporary graphic element" *before* the new webpage is "displayed." *See* Wilson II Decl. Ex. S
 25 at 3. But Motorola does not dispute that the alleged "temporary graphic element" is shown while
 the browser is "loading" the new webpage. Thus the dispute is whether the claim covers the
 moment in time when the new webpage is being loaded, but has not yet been displayed.

1 different steps (although the two steps may overlap in time). Motorola points to arguments
 2 concerning claims 6, 11, and 17 (which issued as claims 12, 19, and 2), *see* Motorola Br. at 6:20–
 3 7:12, but Motorola overlooks that the amendment to claim 11 explicitly states: “wherein the
 4 ***loading***, the content ***displaying***, and the temporary graphic element displaying steps ***occur at***
 5 ***least partially concurrently.***” McCune Decl. Ex. F at 50371. This amendment directly supports
 6 Microsoft’s position that “loading” and “displaying” are distinct steps that can overlap in time,
 7 and contradicts Motorola’s position that “loading” and “displaying” are the same step (or at least
 8 occur at exactly the same time). Furthermore, the “remarks” quoted by Motorola are consistent
 9 with Microsoft’s position that “loading” and “displaying” can overlap in time; the “remarks” do
 10 not provide “clear and unmistakable” support for Motorola’s position that “loading” and
 11 “displaying” must occur at exactly the same time. Reprinted below is the entirety of the
 12 “remarks” cited by Motorola:

13 Claims 6, 11, and 17. While the content is being loaded, that content is
 14 visible to the user. For clarification, Applicant changes the wording of
 15 independent claims 6 and 11 and adds dependent claim 17 (which is dependent
 16 from claim 1). Amended claim 6 now includes “...when the browser is loading
 17 visible content...” and the graphic element “...only partially obstructs visible
 content....” In claim 11, the following language is added: “...wherein the loading,
 the content displaying...occur at least partially concurrently....” These changes
 are made to clarify that the loading content is visible.

18 *Id.* at 50375. It is true that at some points in time, “content” being “loaded” will also be “visible”
 19 to the user — given that the “loading” and “displaying” steps can overlap in time — but the
 20 claims also cover moments when “visible content” is being “loaded” but has not yet been
 21 “displayed” on the screen.

22 Motorola also cites to a later passage in the prosecution history, *see* Motorola Br. at 7:14–
 23 :23, but again that passage is consistent with Microsoft’s position that “loading” and
 24 “displaying” are distinct steps that can overlap in time; the passage does not provide “clear and
 25 “unmistakable” support for Motorola’s position that “loading” and “displaying” must occur at

1 exactly the same time.

2 3. “obstruct[s/ing]” (claims 1, 12, 32, 33, 36, 39, 40)

Microsoft’s Claim Construction	Motorola’s Claim Construction
No construction needed. Alternatively: “to block or otherwise interfere with”	“to block from sight”

5 All of Motorola’s arguments about “obstruct” were anticipated in Microsoft’s opening
 6 brief, and thus nothing more need be said. *Compare* Microsoft Br. at 8:18–10:12, with Motorola
 7 Br. at 8:4–9:9.

8 B. U.S. Patent No. 7,411,582 to Toepke (effectively filed Dec. 16, 1997)

9 1. “icon” (claims 1, 15)

Microsoft’s Claim Construction	Motorola’s Claim Construction
“an on-screen representation of something”	“a small image displayed on the screen to represent an object that can be manipulated by the user”

13 Motorola argues that its proposed construction should be accepted because it is derived
 14 from a portion of the definition for “icon” in a *Microsoft* Computer Dictionary. *See* Motorola
 15 Br. at 12:16–17. As explained in Microsoft’s opening brief, the ’582 patent’s intrinsic evidence
 16 includes an “icon” which is *text*, whereas Motorola is hoping to exclude *text* from being an
 17 “icon” with its proposed construction requiring a small “*image*.¹” *See* Microsoft Br. at 11:20–
 18 12:26. Thus Motorola is trying to use extrinsic evidence (the Microsoft Computer Dictionary) to
 19 contradict the intrinsic evidence. That is improper, regardless of the source of the extrinsic
 20 evidence. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1319 (Fed. Cir. 2005) (en banc)
 21 (“[E]xtrinsic evidence may be useful to the court, but it is unlikely to result in a reliable
 22 interpretation of patent claim scope unless considered in the context of the intrinsic evidence.”);
 23 *see also Intel Corp. v. VIA Techs.*, 319 F.3d 1357, 1367 (Fed. Cir. 2003) (“When an analysis of
 24 *intrinsic* evidence resolves any ambiguity in a disputed claim term, it is improper to rely on
 25 extrinsic evidence to contradict the meaning so ascertained.”).

1 Motorola's proposed construction is also incorrect because it impermissibly imports a
 2 limitation from an example in the specification. Motorola argues that "the '582 Patent only uses
 3 the term 'icon' to describe images — not text," based on the patent's example of an icon that is a
 4 keyboard. *See* Motorola Br. at 12:18–13:15. However, there is nothing in the '582 patent that
 5 limits icons to only images, rather than also permitting icons to include text. Moreover, both the
 6 intrinsic evidence and the icon illustrated in the Microsoft Computer Dictionary — upon which
 7 Motorola's relies for its construction — demonstrate that an icon can include text. *See* Microsoft
 8 Br. at 12:6–13:19. Therefore, Motorola's proposed construction should be rejected.

9 **2. “distinct from . . . computer/application/ programs”**
 10 **(claims 1, 11, 15, 19)**

Microsoft's Claim Construction	Motorola's Claim Construction
No construction needed. Alternatively: "containing software code that is separate from the software code of the computer programs"	Independent and separate from the computer programs and applications. Computer programs and applications are self-contained executable software

14 Motorola's reliance on "prosecution disclaimer" is misplaced. *See* Motorola Br. at
 15 14:18–15:15. The claims require a software "component," and as explained in Microsoft's
 16 opening brief, a "component" is a "distinct" piece of software, but at runtime the component is
 17 "combined" with other software, and thus it would be incorrect to call the component software
 18 "independent" or "self-contained" as proposed by Motorola. *See* Microsoft Br. at 17:22–18:4.
 19 The passing use of the term "independent" during prosecution does not amount to a "clear and
 20 unmistakable" surrender of the ordinary meaning of "component" software. *See supra* Part II,
 21 p. 1 (discussing requirements for "prosecution disclaimer").

22 Motorola also argues that computer programs and applications **must** be "self-contained"
 23 based purely on extrinsic evidence — a computer dictionary which states that the term computer
 24 program "**usually** implies a self-contained entity." Motorola Br. at 16:7 (emphasis added). But
 25 again, Motorola overlooks that the claims require a "component," and the same dictionary cited

1 by Motorola makes clear that “components” are *not* self-contained but instead are “*combined*
 2 with other components to form an overall program.” *See* Microsoft Br. at 17:22–18:4.

3 **3. “window” (claims 11, 14, 15, 21–23, 29–31)**

Microsoft’s Claim Construction	Motorola’s Claim Construction
No construction needed. Alternatively: “a portion of the screen that can contain its own document or message”	“a portion of the screen that can contain its own document or message and <i>that is hidable, dockable, movable and resizable</i> ”

7 Most of Motorola’s arguments about “window” were anticipated in Microsoft’s opening
 8 brief, and thus will not be addressed again. *Compare* Microsoft Br. at 18:10–19:7, *with*
 9 Motorola Br. at 16:19–18:11. Motorola cites to claims 8 and 9 in support of its proposed
 10 construction, *see* Motorola Br. at 17:23–:25, but those claims do not even contain the term being
 11 construed (“window”). Motorola also argues that Microsoft’s proposed construction “is
 12 incomplete because it excludes the requirement that each window ‘has its own boundaries,’” *see*
 13 Motorola Br. at 18:1–:3, but Motorola’s proposed construction does not contain this requirement
 14 either. The term “window” will be familiar to any juror and needs no construction, but if the
 15 Court disagrees, then Microsoft would not object to the Court adopting the *complete* definition
 16 found in the dictionary that both Microsoft and Motorola are relying upon, including the
 17 clarification that window-based programs may (but are not required to) be divided into several
 18 windows, each of which “has its own boundaries.” *See* Microsoft Br. at 18 n.8 (citing Wilson
 19 Decl. Ex. P, at 508).

20 **4. “as if . . . received [via/from]” as used in:**
 21 “. . . as if the information was received via user input
received from a hardware input device” (claim 1)
“. . . as if the input was received via a hardware
keyboard” (claim 4)
“. . . as if the information was received via user input at
a hardware input device” (claim 11)
“. . . as if the user data was received from a hardware
input device” (claim 15)
“. . . as if the input data was received via user input
received from a hardware input device” (claim 19)

Microsoft's Claim Construction	Motorola's Claim Construction
No construction needed. Alternatively: “such that the [program / application] does not need to recognize whether the information was received from a hardware input device or not” “such that the [program / application] does not need to recognize whether the input was received from a hardware keyboard or not” “such that the [program / application] does not need to recognize whether the information was received from a hardware input device or not” (claim 11) “such that the [program / application] does not need to recognize whether the data was received from a hardware input device or not”	“as if the received information originated from a hardware input device rather than the interactive input panel”

Motorola asserts that its “construction tracks the express claim language,” Motorola Br. at 19:7, when in fact Motorola is trying to rewrite the express claim language. In particular, the claims do not use the word “originated” and thus do not require the program/application to believe that the information **originated** from a hardware input device. To the contrary, the '582 patent explicitly states the opposite: user input is “placed in the message queue of the active application’s window **without the application being provided with information as to the source.**” Wilson Decl. Ex. L, '582 patent at 4:65–:67 (emphasis added). Furthermore, the '582 patent states that “applications do **not** ordinarily recognize whether data received thereby originated at a hardware input device such as the keyboard or via user activity.” *Id.* at 7:49–:53 (emphasis added). Therefore, Motorola’s attempt to rewrite the claims should be rejected, and no construction is needed.

5. “invoking [a/the] selected input method” (claims 15, 17)

Microsoft's Claim Construction	Motorola's Claim Construction
No construction needed. Alternatively: “loading and calling the selected input method”	“loading and calling the selected input method by a management component ”

Motorola’s arguments depend on conclusory statements about what it deems

1 “fundamental to the alleged invention.” Contrary to Motorola’s arguments, the patent lists six
 2 objects of the ’582 invention, none of which references a management component. *See* Wilson
 3 Decl. Ex. L, ’582 patent at 2:1–22. Furthermore, only some of the claims refer to a “manager
 4 component” (claims 19, 23, 26–27, and 30–31), which strongly implies that the other claims
 5 (including claims 15 and 17, which include the “invoking” phrase at issue) do **not** require a
 6 “management component.”

7 In the end, Motorola relies on the use of “e.g.” in the ***prosecution history*** to argue there
 8 was an “express definition.” *See* Motorola Br. at 21:18–22:8 (citing *Sinorgchem Co. v. ITC*, 511
 9 F.3d 1132, 1138 (Fed. Cir. 2007)). But “e.g.” simply means “for the sake of an example,” and is
 10 not an “express definition,” as Motorola contends. *See, e.g., New v. Dep’t of Veterans Affairs*,
 11 142 F.3d 1259, 1265 (Fed. Cir. 1998) (“e.g., the short form of *exempli gratia*, which means ‘for
 12 the sake of an example’”) (quoting *Black’s Law Dictionary* 515 (6th ed. 1990)); *see also* Bryan
 13 Garner, *A Dictionary of Modern Legal Usage* 307 (2d ed. 2001) (“e.g., the abbreviation for the
 14 Latin phrase *exempli grati* (= for example), introduces representative examples”), available at
 15 Wilson II Decl. Ex. T. Furthermore, in *Sinorgchem*, the sole case Motorola cites in support of its
 16 absurd argument that using “e.g.” in a patent results in an “express definition,” the Federal
 17 Circuit never even considered “e.g.” when it construed the disputed term. Instead, the Federal
 18 Circuit construed the disputed term based on an express definition in the patent, which was “set
 19 off by quotation marks — often a strong indication that what follows is a definition.” 511 F.3d
 20 at 1138. Finally, *Sinorgchem* concerned a statement in the ***specification***, whereas Motorola is
 21 relying on a statement in the ***prosecution history***, meaning Motorola would need to point to a
 22 “clear and unmistakable” disclaimer, which it has not done. *See supra* Part II, p. 1. Thus the use
 23 of “e.g.” in the prosecution history of the ’582 patent should be taken for exactly what it is — an
 24 example, rather than a definition — and “management component” should not be imported into
 25 the construction for “invoked.”

1 **6. “interface” (claims 3, 11, 27)**

Microsoft’s Claim Construction	Motorola’s Claim Construction
No construction needed. Alternatively: “the point at which a connection is made between two elements so that they can work with each other or exchange information”	“a defined set of methods and data that allow for communication with a COM object ”

5 Motorola’s proposed construction blatantly violates the prohibition against importing
 6 limitations from the specification into the claims. *See* Microsoft Br. at 14:18–15:3. In its brief,
 7 “Motorola acknowledges that the patent does use the phrase ‘preferably’ and in the ‘preferred
 8 embodiment’ in describing the use of COM objects,” but Motorola then proceeds to argue that
 9 courts have limited constructions to embodiments where the patent “repeatedly describes that
 10 single embodiment as the invention and as performing the claimed function.” Motorola Br. at
 11 23:23–24:10. However, contrary to Motorola’s suggestion, the ’582 patent neither “repeatedly”
 12 references interfaces with COM objects, nor does the patent describe interfaces with COM
 13 objects as the invention. To the contrary, the specification states that “[a]n input method . . . **may**
 14 be a COM object,” and that interfaces do **not** have to be “COM objects” but instead “can
 15 comprise virtually any components capable of communicating with one other through some
 16 mechanism.” Wilson Decl. Ex. L, ’582 patent at Abstract (emphasis added), 7:9–11. Therefore,
 17 Motorola’s argument that an “interface” must incorporate a COM object is contradicted by the
 18 specification and should be rejected.

19 **IV. CONCLUSION**

20 For the foregoing reasons, Microsoft’s proposed constructions should be adopted.

DATED this 18th day of May, 2012.

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1 **EXHIBITS TO "WILSON II DECL."**

- 2 Ex. R: Microsoft's infringement contentions for the '780 patent (Sept. 2, 2011)
- 3 Ex. S: Motorola's non-infringement contentions for the '780 patent (Dec. 2, 2011)
- 4 Ex. T: Bryan Garner, *A Dictionary of Modern Legal Usage* (2d ed. 2001) (entry for "e.g.")

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26 MICROSOFT CORPORATION'S RESPONSIVE
CLAIM CONSTRUCTION BRIEF ON ITS '780
AND '582 COUNTERCLAIM PATENTS - 14
Case No. C10-1823-JLR

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CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
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5 DATED this 18th day of May, 2012.
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8 s/ Linda Bledsoe
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MICROSOFT CORPORATION'S RESPONSIVE
CLAIM CONSTRUCTION BRIEF ON ITS '780
AND '582 COUNTERCLAIM PATENTS - 16
Case No. C10-1823-JLR

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